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In The

Supreme Court Of The United States

Vincent Gillespie,
Petitioner,
v.
Peggy Roggenbuck Gillespie,
Respondent

On Petition For Writ Of Certiorari
To The Massachusetts Court Of Appeals

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I) TABLE OF CONTENTS:

I)	**Table of Contents**	i
II)	**Table of Authorities**	i
III)	**Introduction**	1
IV)	**Discussion**	1
	A) Background: Peggy in her role as executrix is thwarting Greg's charitable intention of having his paintings placed in museums	1
	B) The Doctrine Of Cy Pres	4
	C) The Doctrine Of Equitable Deviation	8
V)	**Conclusion**	10
VI)	**Appendix**	11
	P) Appendix P: Excerpt from deposition of Robert Fishko	12

II) TABLE OF AUTHORITIES:

15 Am.Jur.2d. § 50	6
15 Am.Jur.2d. § 148	9
15 Am.Jur.2d. § 149	4, 5, 9
15 Am.Jur.2d. § 155	9
15 Am.Jur.2d. § 156	9
Graham v. Quincy Food Service Employees Association and Hospital Library and Public Employees Union, 407 Mass. 601 (1990)	7

III) INTRODUCTION:

The Doctrine Of Cy Pres was briefly mentioned in the Petitioner's Petition For Writ Of Certiorari ("Petr.") (p. 17, and Ap.N-103[1]). This Supplemental Brief provides some additional authorities and information regarding the Doctrine Of Cy Pres and how it is applicable to the instant case. The Doctrine Of Equitable Deviation and its applicability to this case is also discussed.

IV) DISCUSSION:

A) Background: Peggy in her role as executrix is thwarting Greg's charitable intention of having his paintings placed in museums:

Greg stipulated in his will that Peggy Roggenbuck Gillespie ("Peggy"), his widow, should be the executrix. During her relationship with Greg while he was alive, Peggy abused him, exploited him, showed great contempt for his interests and she manipulated him, often in ways that he did not fully understand. (See Petr., p. 10, fn # 12).[2] Peggy's refusal to place Greg's paintings into museums, while trying to rapidly sell as many paintings as possible,[3] despite her

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[1] See the Abbreviations Key in the Petr., p. iii, footnote 1.

[2] In 2003 both the petitioner and his attorney (Tom Kenefick) submitted materials to the Charitable Division of the Massachusetts Attorney General's Office in an effort to have them become involved in this case. Ms. Johanna Soris of that office, after reviewing these materials, which discussed, among other things, Peggy's abusive and manipulative conduct towards Greg, wrote that: "...this case involves a very dysfunctional family situation which is also very ambiguous." (A2-744.)

[3] Peggy has had at least six shows in which she has endeavored to sell Greg's work since she was made executrix in July of 2000. She had one at the Forum Gallery in NYC, three at the Nielsen Gallery in Boston, and two at the Salander-O'Reilly Gallery in NYC. All the while she has [Footnote continued on next page ...]

having acknowledged that it was a lifelong desire of Greg's to have his paintings placed in museums (MCA.Reply.Br-17; A1-233-234, par. 12), reflects a continuation after his death of her exploitation and abuse of him during his life.

Peggy, in her role as executrix, is entirely incapable of fulfilling Greg's primary intention of having his paintings placed in museums. As mentioned in the Petr., Peggy has repeatedly insisted that she has no obligation at all to place Greg's paintings in museums and her lack of effort in this area is reflected in the fact that during the entire time she has been executrix only two small paintings have been placed in museums.[4] (Petr., pp. 9-10.) As also mentioned in the Petr., Peggy has a conflict of interest because placing paintings in museums generally requires sales prices to be reduced or for paintings to be donated, but any reduction in prices would reduce Peggy's profits. (Petr., p. 10.) The fact that, prior to the start of this litigation she held shows of Greg's work at the Forum Gallery and the Neilsen Gallery without even informing these dealers about the terms of Greg's will indicating that paintings were to be placed in museums (Petr., pp. 9-10; MCA.Op.Br-11-12[5]; A1-68; A1-140-141) shows that Peggy had no intention at all of trying to place Greg's work in museums, it was not even on her radar screen. (How could the dealers have even attempted to try to make any special effort to place Greg's paintings in museums if they did not even know they were supposed to do so?) Furthermore, it should also be considered that placing paintings in museums can be an involved matter, requiring

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for the most part refused to make any real effort to place paintings in museums.

[4] Even those two museums sales appear to have occurred through the normal course of events rather than through any special effort by Peggy to place paintings in museums.

[5] Footnote 10 on p. 12 of our Opening Brief to the Massachusetts Court of Appeals is missing some of its references. Please refer to the Errata Sheet for that document as necessary.

substantial time and effort. Robert Fishko, in his deposition, stated that it involves "... a major effort on the part of the artist's representative..." (See Ap.P-12.)

Given all of these facts, it is apparent that as long as Peggy is the executrix there is basically a snowball's chance in hell of any significant portion of Greg's paintings getting into museums. Peggy is very capable of implementing the clause in the will about maximizing prices, since that directly profits her, but she has clearly shown herself to be completely incapable of implementing what Greg identified as his primary intention and what the Mass. Court of Appeals implicitly acknowledged was a charitable purpose (Petr., p. 15, par. 1), Greg's longstanding and deep desire to have his paintings placed in museums. Thus the stipulation that Peggy should be the executrix is a clause in the will which thwarts and makes it impossible to implement the charitable purpose of placing Greg's paintings in museums.[6]

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[6] It might be argued that since the will stipulates that sales prices of the paintings should be maximized (Petr., p. 9) this ties Peggy's hands and would limit her ability to place paintings in museums even if she really wanted to (since placing paintings in museums frequently requires reducing prices or donating paintings). Two things in response:

First, even without reducing prices there is much more that Peggy could do to endeavor to get paintings into museums. It is obvious that Peggy has done very little in this regard and her repeated insistence that she has no obligation to place paintings in museums and other things she had done, as discussed above (pp. 1-3), lead to the conclusion that another executor who really wanted to place paintings in museums could do much more than her in this regard.

Second, the Doctrine Of Cy Pres and the Doctrine Of Equitable Deviation (both discussed below) both allow for overriding portions of a trust which thwart a charitable purpose. Thus, if this court did choose to apply one of these doctrines to the instant case for the purpose of removing the executrix, as the petitioner advocates in this Supplemental Brief, then the court could additionally use the same doctrine to override this clause in the will (requiring that prices be maximized) and allow pricing flexibility regarding sales to museums.

So what we have here is a situation in which the will includes a clause (making Peggy the executrix) which make it *impossible* to carry out the wishes, the explicitly stated charitable intent, of the testator. This is a situation which is ripe for the application of the Doctrine Of Cy Pres or, alternatively, the Doctrine Of Equitable Deviation. These two doctrines enable a court to override portions of a trust if necessary to fulfill a charitable purpose. Thus if either of these doctrines were applicable to the instant case they would enable the court to take action by authorizing the overriding of portions of the will to facilitate the charitable purpose of having Greg's paintings placed in museums.

B) The doctrine of cy pres:

The Doctrine Of Cy Pres is described in American Jurisprudence as follows:

> "In the exercise of its equitable jurisdiction a court may control the administration of a charitable trust so as to effectuate its avowed purposes, particularly when changing circumstances would otherwise defeat them. *Courts will ordinarily permit deviation from the terms of a charitable trust where compliance is illegal, impracticable, or impossible,* or where, owing to circumstances not known to the settler, literal compliance will defeat or substantially impair the accomplishment of the purposes of the trust. Depending upon the circumstances and the reason for deviation, the court may do this under the doctrine of cy pres, or under the doctrine of equitable deviation, which is applicable to all trusts, private or charitable. ..."[7]

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[7] All footnotes included in all quotations from American Jurisprudence have been omitted in this brief. Note that this also applies [Footnote continued on next page ...]

(Emphasis added.)
(15 Am.Jur.2d, § 148.)

> "The doctrine of cy pres is a simple rule of judicial construction, designed to aid the court to ascertain and carry out, as nearly as may be, the intention of the donor when the intent cannot be effectuated to the letter of the donor's directions or specifications. The doctrine of cy pres assumes that a valid charitable trust has been created and will not be applied to save a trust which is not a valid charitable one."
>
> (15 Am.Jur.2d, § 149.)

So the question is whether or not the Doctrine Of Cy Pres is applicable to the instant case. American Jurisprudence lists three characteristics which need to be present for cy pres to be applicable:

> "... cy pres is applicable in situations where (1) property is given in trust for a particular charitable purpose; (2) it is, or becomes, impossible, impracticable, or illegal to carry out such purpose; and (3) the settler manifested a more general intention to devote the property to charitable purposes."
>
> (15 Am.Jur.2d, § 149.)

The first of these three characteristics, a particular charitable purpose (as opposed to a larger, more general charitable intention), has been met with Greg's stated "primary intention" of maximizing the viewing audience of his paintings (i.e., placing his paintings into museums). As

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to the Petr., although the petitioner forgot to mention this fact in that brief.

noted in the Petr., the Massachusetts Appeals Court implicitly acknowledged that this intention was charitable (Petr., p. 15, par. 1). As also noted in the Petr. (p. 17), "[a] trust for the support of an art or other public museum is also a valid charitable purpose..." (15 Am.Jur.2d, §50). So we have a particular charitable purpose.

The second characteristic listed by American Jurisprudence is that "...it is, or becomes, impossible ... to carry out such [charitable] purpose..." This characteristic is also present in the instant case. As discussed above on pp. 1-4, The charitable purpose of placing paintings in museums is being thwarted by the clause in the will which made Peggy the executrix.

The third characteristic listed by American Jurisprudence is that "...the settler [must have] manifested a more general intention to devote the property to charitable purposes..." (in addition to the particular, specific charitable purpose which the Doctrine Of Cy Pres is being employed to protect). Greg's overall, general and primary intention was to maximize the viewing audience of the paintings after their sales. As discussed below, this is a charitable purpose.

The Respondent has argued, however, that the additional aim of maximizing the sales prices of the paintings and the fact that Peggy (and Julianna) are the primary trust beneficiaries cause the will and trust to not be charitable. However, in his Motion For Reconsideration to the Probate Court the petitioner provided evidence, affidavits, showing that Greg wanted to maximize his prices for the purpose of maintaining the *prestige* of the paintings, an objective which is entirely consistent with his desire to have the public view and appreciate his work as much as possible. The affidavits also confirmed that Greg's overriding and primary intention was to maximize the viewing audience of his works after their sales, to have them placed in museums where they would be seen and appreciated by many people, and not to benefit Peggy and Jay. (See the Petr., pp. 18-19.)

Note that for a summary judgment motion the trial court and the reviewing court must assume that these affidavits and all other well pled facts in the petitioner's briefs are true. In Graham V. Quincy Food Serv. Emp. Ass'n & Hosp., Lib., 407 Mass. 601 (1990), 555 N.E.2d 543 the Massachusetts Supreme Court stated the following about the reviewing standard regarding a grant of summary judgment:

> "Generally, in reviewing a grant of summary judgment, we view the facts in the light most favorable to the party opposing summary judgment. *Alioto* v. *Marnell,* 402 Mass. 36, 37 (1988). **Thus, we assume that 'all of the facts set forth in the [opposing party's] affidavits [are] true. ...'** *Coveney* v. *President & Trustees of the College of the Holy Cross,* 388 Mass. 16, 17 (1983). When the court below grants summary judgment for the nonmoving party, we invert the usual standard and 'view the record in the light most flattering to ... the summary judgment loser,' here, the plaintiff. *Quaker State Oil Refining Corp.* v. *Garrity Oil Co.,* 884 F.2d 1510, 1513 (1st Cir. 1989)."
>
> (Emphasis Added.)
> (Graham V. Quincy Food Serv. Emp. Ass'n & Hosp., Lib., 407 Mass. 601 at 603.)

(See also additional case citations pertaining to the standard of review for a grant of summary judgment in the Petr., p. 30, fn 30.) Thus, for the purposes of this petition, it must be assumed that Greg wanted the sales prices of his paintings to be maximized for the purpose of furthering his primary objective, which was to maximize the viewing audience of his paintings after their sales (this is what the affidavits in the Motion For Reconsideration say). Thus, it should be

assumed (at least for the purposes of this petition) that the overriding, primary and general intention of the will was a charitable one (despite the fact that Peggy and Julianna benefit from the proceeds of the sales).

To the extent that there is ambiguity regarding this point, the very powerful language from American Jurisprudence cited in the Petr. (pp. 16-17), as well as the factual reasons set out on p. 16 of the Petr., guide and empower the court to interpret the trust in favor of a charitable purpose.

Thus, we have established that the overall, general intent of the will and trust are charitable, and so the Doctrine Of Cy Pres can be used to remove the executrix and replace her with someone who will endeavor to place the paintings in museums.

C) The doctrine of equitable deviation:

If this court should disagree with the above arguments asserting that Greg's overall, primary and general intention was charitable, then this court might conclude that the Doctrine Of Cy Pres is inapplicable. Even if we assume, just for the sake of argument, that the overall, primary and general intention of the will and trust is not charitable, we still have the decision of the Massachusetts Court of Appeals, which implicitly acknowledged that Greg's intention of maximizing the viewing audience of his paintings after their sales *was* charitable (although it also held that the will as a whole was not charitable) (Petr., p. 15, par. 1). If we assume, for the sake of argument, that the Massachusetts Court of Appeals's decision is correct on this point then what we have is that Greg's particular (or limited) intent of placing paintings in museums is charitable while his general (if we assume this were correct, although we could not apply the Doctrine of Cy Pres we could nonetheless apply the Doctrine Of Equitable Deviation.

American Jurisprudence says the following about the Doctrine Of Equitable Deviation:

> "A key difference between [the doctrine of cy pres and the doctrine of equitable deviation] is that which concerns the underlying charitable intent necessary before the doctrines may be applied to a charitable trust. For the cy pres doctrine to apply, a general charitable intent must have been manifested by the donor, but a specific, as distinguished from a general, charitable intent, suffices for the application of the doctrine of equitable deviation."
>
> (15 Am.Jur. 2d, § 149.)

> "When deviation from the administrative provision of a charitable trust is appropriate, a court may direct or permit the trustee to accomplish acts that are unauthorized or even forbidden by the terms of the trust. Equitable deviation can be distinguished from the somewhat similar doctrine of cy pres in that the equitable deviation deals only with changes in the administrative provisions of a trust, while cy pres involves an alteration of the purpose to which the res of the trust is to be applied."
>
> (15 Am.Jur. 2d, § 155.)

The two doctrines, Cy Pres and Equitable Deviation, are basically similar to each other except that: (1) the latter is limited to administrative changes while the former is not and (2) the former requires a general (or larger) charitable intent in order for that doctrine to be applicable, while a particular (more limited) charitable intent is sufficient to enable the latter doctrine to apply. (15 Am.Jur.2d § 148, 149, 155 and 156.) Let us examine the instant case to see if the Doctrine Of Equitable Deviation is applicable:

Is there sufficient charitable intent? We need only a particular charitable intention (as opposed to a larger, general one) for the Doctrine Of Equitable Deviation to be

applicable. As discussed above the Mass. Court of Appeals has implicitly acknowledged that what Greg stated was his primary intention, his desire to have his paintings placed in museums, was charitable. Thus we have a particular charitable purpose even if the overall or general intent is not charitable and that is sufficient for the application of the Doctrine Of Equitable Deviation.

The Doctrine Of Equitable Deviation is limited to administrative changes: There is the fact that, unlike the Doctrine Of Cy Pres, the Doctrine Of Equitable Deviation is limited to enabling administrative changes in a trust, as opposed to fundamental changes in the disposition of the res of the estate. The primary change being advocated by the petitioner, removal of the executrix, is surely an administrative change which falls within the purview of the Doctrine Of Equitable Deviation. Thus this limitation of the Doctrine Of Equitable Deviation does not prevent this doctrine from applying to the instant case.

Thus, even if this court agrees with the Massachusetts Court Of Appeals's holding that Greg's general (or overall) intention was not charitable but that his particular (specific, limited) intention to place paintings in museums was charitable, although this would make the Doctrine Of Cy Pres inapplicable, nonetheless the Doctrine Of Equitable Deviation would be applicable. This doctrine couild be employed in this case to facilitate the removal of the executrix who is thwarting Greg's particular charitable intention of placing Greg's paintings in museums.

V) CONCLUSION:

For all of the reasons in this Supplemental Brief as well as all of the reasons in the Petitioner's Petition For Writ Of Certiorari, this court should grant this petition.

Date: April 25th, 2007 Signed: Vincent Gillespie

Vincent Gillespie
Party in pro per